No. 11625.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ESTATE OF BELLE ALICE HAMBURGER NATHAN, EVELYN HAMBURGER, Executrix,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPLY BRIEF FOR THE PETITIONER.

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TABLE OF AUTHORITIES CITED

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While the value of property for tax purposes is a question of fact as stated by respondent (Br. 16), the question of whether the method used by the trial court was according to law is a question of law.

> *Laird v. Commissioner,* 3 Cir. 85 F. (2d) 598;
> *Weber v. Rasquin,* 2 Cir. 101 F. (2d) 62;
> *Guggenheim v. Helvering,* 2 Cir. 11 F. (2d) 469.

Petitioner's sole theory in this review is that The Tax Court did not consider the various factors of value which the law and the Treasury Regulations require it to consider. If this Honorable Court agrees with petitioner the decision must be reversed.

> *Nee v. Katz,* 47-2 U. S. T. C., Par. 10,569 (C. C. A. 8).

Petitioner has not and does not contend that each factor must be given equal force (Br. 18) but petitioner does contend that each factor must be considered.

We agree with respondent that the "choice" of the determinative factors and the weight to be accorded each factor must be governed by the circumstances of each case. (Br. 18.) But "choice" must necessarily presuppose consideration of the various factors and where there has been no consideration of the various factors, there can be no choice as between them. We submit that the elimination of certain factors from consideration, which elimination is the result of erroneous conclusions and assumptions, as was done in the instant case, does not give rise to a "choice" of determinative factors.

Weber v. Rasquin, 101 F. (2d) 61.

Respondent's argument on pages 19 to 22, inclusive, of his brief would be pertinent only if directed to the trial court. We are not attempting in this court to determine the value of any property. It may well be that certain witnesses gave more emphasis to the "willing buyer" while others gave more emphasis to the "willing seller," but that is of no concern to this Court. This court's function in the instant matter is to determine whether the values found by The Tax Court were arbitrary and excessive; whether the method used by The Tax Court was in accordance with the law and regulations, and in that regard, whether The Tax Court considered all the factors of valuation as to which there was evidence in the record.

We shall not argue with respondent with respect to his arguments or conclusions appearing on pages 22 to 25, inclusive, of his brief. Whether his conclusions are

correct or not is not important on this review. What is important is that by the mention of the various factors, respondent recognizes that those factors are involved herein and that they should have been considered by The Tax Court. That the factors mentioned by the respondent were not considered by The Tax Court appears affirmatively from the opinion rendered by The Tax Court and equally from respondent's footnote on page 23 of his brief. The use of the words "may well have tended" is an attempt to read into the mind of the fact-trier something which, while it should have been considered, was not mentioned or considered by The Tax Court. The fact that The Tax Court made no mention of such factors and disregarded its own findings of fact is affirmative proof that The Tax Court did not consider those factors.

Worcester County Tr. Co. v. Commissioner, 134 F. (2d) 578 at 582;

Nee v. Katz, 47-2 U. S. T. C., Par. 10,569.

Respondent's argument or rather his theorizing as to what might have been is again an admission by respondent that The Tax Court did not consider the factors referred to. Why else in footnote 7, page 27 of his brief, would he say the fact-trier "might well have considered . . ."? Respondent says in said footnote that the "logical result" of what might have been had The Tax Court considered said referred to factors would be to fix the capitalization rate at 6 per cent or 7 per cent or 8 per cent. Using respondent's own figures of annual foreseeable future income (Br. 26) the resultant values would be approximately $3,465.44, $3,032.26, and $2,697.38 per share, respectively, for Hamburger Realty Company.

Since these capitalization rates would be the "logical result" if The Tax Court had considered the said factors, is this not proof that The Tax Court did not consider these factors, else how could it "logically" determine a value of $3,900.00 per share?

We heartily agree with respondent that The Tax Court gave like consideration of the various factors as Mr. Allen (Br. 28), which is to say—none. For, although Mr. Allen in answer to direct questions stated he considered each factor [R. 243-246], on cross-examination he could not state as to any one factor how he had taken such factors into consideration. [R. 265-269; 280-281.] Indeed, Mr. Allen testified that if these corporations had shown an average net loss per year instead of an average net income, the stock of these corporations would have been worth more. [R. 273.] Mr. Allen testified that he arrived at his valuations by dividing the net worth of each company by the number of outstanding shares and then rounded the figures off. [R. 262-263-275-285-286-288-291.] The instant case is Mr. Allen's first case in which he was called to give his opinion as to the value of corporate stocks. All other cases involved real estate values. [R. 255.] And although he claimed to have testified before the Board of Tax Appeals or The Tax Court at least once a year since 1934, he could remember the name of but one case in which he had so testified. [R. 254-255.] And, finally, Mr. Allen testified that the appraisal of a corporate stock is a mere mathematical calculation, which he doesn't do. He merely determines the value of the real estate and then anybody can divide the number of shares into the net worth. [R. 257-258.] We believe the record shows unequivocally

that Mr. Allen was a real estate appraiser and nothing more [R. 256-257], and gave consideration only to net worth.

The only evidence regarding the value of real estate corporation stocks was given by witnesses called by petitioner and that evidence showed that such stocks were selling at discounts of 50 per cent to 80 per cent of the net worth and for six times earnings. [R. 219.]

Petitioner submits that the rule laid down in *Dobson v. Commissioner,* 320 U. S. 489, no longer obtains, in view of the recently enacted Administrative Procedure Act, 5 U. S. C. A., Sec. 1001, *et seq.,* which, among other things, provides for review of decisions of administrative agencies. This Act provides that reviewing courts may set aside agency action, findings, and conclusions which are not supported by substantial evidence.

That The Tax Court is such an agency is hardly open to argument. The act creating the Board of Tax Appeals provided that the Board was "an independent agency in the executive branch of the government." 53 Stats. 158, 26 U. S. C. A., Sec. 1100. See, also, *Old Colony Trust Co. v. Comm.,* 279 U. S. 716. When the name of the Board was changed to The Tax Court, the Revenue Act of 1942 provided: ". . . the jurisdiction, powers and duties of the Tax Court . . . shall be the same as by existing law provided in the case of the Board of Tax Appeals." Revenue Act of 1942, Sec. 504.

The Supreme Court of the United States, in *Commissioner v. Gooch Milling & Elevator Co.,* 320 U. S. 418, held the Board to be an agency. This case was decided in December, 1943, after the Board had become The Tax

Court. See, also, *Hutchings-Sealy Nat'l Bank v. Comm.*, 141 F. (2d) 422, holding The Tax Court to be an agency.

In *Lincoln Electric Co. v. Commissioner* (6 Cir.), 47-1 U. S. T. C., par. 9282, the Court held the Administrative Procedure Act applied to The Tax Court and the *Dobson* case no longer applied.

In view of the foregoing, we submit that The Tax Court is subject to the Administrative Procedure Act and that this Court has full power of review thereunder.

Conclusion.

The decision of The Tax Court should be reversed and the case remanded with instructions to afford the parties an opportunity for further hearing.

Respectfully submitted,

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